JOSEPH M. McMULLEN
California State Bar No. 246757
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Email: Joseph_McMullen@fd.org

Attorneys for Mr. Smith

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA,	)	CASE NO. 07CR3161-LAB
Plaintiff,	)	DATE: June 13, 2008 TIME: 9:00 a.m.
v.	)	
GENARO SMITH-BALTIHER,	)	NOTICE OF MOTION AND MOTION TO RECONSIDER REQUEST FOR CONTINUANCE
Defendant.	)	

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND PAUL L. STARITA, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on June 12, 2008, at 9:00 a.m. or as soon thereafter as counsel may be heard, the defendant, Genaro Smith-Baltiher, by and through his counsel, Joseph M. McMullen and Federal Defenders of San Diego, Inc., moves this Court for an order continuing the trial date currently set for June 13, 2008.

//

//

//

//

//

//

I.

STATEMENT OF FACTS

Yesterday, on June 10, 2008, a jury was empaneled and heard evidence in an illegal reentry case against Mr. Smith-Baltiher. The jury began deliberating at 9:00 a.m. today, on June 11, 2008. At approximately 4:55 p.m., this Court declared a mistrial upon finding that the jury was deadlocked. This Court initially ordered that the retrial would take place tomorrow, on June 12, 2008, beginning at 10:00 a.m. Defense counsel objected and requested a continuance of one week in order to (1) ensure that the defense's only witness at trial, Mr. Joe T. Alday, an 84 year-old World War II veteran in poor health who resides in Phoenix, Arizona under the full-time care of his daughter, Ms. Rosalinda Alday, would again be available for trial; and (2) to procure an expert witness to rebut the arguments of government counsel to the jury that Mr. Smith or his family members would have been aware of his status as a natural-born citizen under 8 U.S.C. § 1401(g). The request for a one week continuance was denied, and at approximately 5:05 p.m., trial was set for the day after tomorrow, on June 13, 2008, provided that defense counsel would be allowed to present any defense witnesses on Tuesday, June 17, 2008.

During the proceedings on the record today, government counsel and defense counsel also discussed their differing recollections about the testimony of Officer Guzman, the A-file custodian. Less than one hour after defense counsel was excused from this Court upon declaration of the mistrial, defense counsel called the Court Reporter of this Court, Ms. Oemick, and left her a voice message requesting transcripts of yesterday's trial for purposes of Friday's retrial.

II.

THE GOVERNMENT SHOULD CONTINUE THE RETRIAL DATE UNTIL DEFENSE COUNSEL HAS HAD AN ADEQUATE OPPORTUNITY TO PROCURE NECESSARY DEFENSE WITNESSES AND REVIEW TRANSCRIPTS OF GOVERNMENT WITNESS TESTIMONY FROM THE TRIAL IN THIS CASE

The Ninth Circuit considers four factors to determine whether the denial of a continuance constitutes reversible error: (1) the defendant's diligence in preparing his defense prior to the trial date; (2) whether the continuance would have satisfied his needs; (3) the inconvenience a continuance would have caused the court and the government; and (4) the extent to which the defendant might have suffered harm as a result of the district court's denial. United States v. Zamora-Hernandez, 222 F.3d 1046, 1049 (9th Cir. 2000). "The fourth factor is the most critical." Id.

The Supreme Court has found that "even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." Britt v. North Carolina, 404 U.S. 226, 228 (1971). "Courts have repeatedly recognized that counsel's memory or notes and access to the court reporter at trial are not adequate substitutes for a transcript of a prior proceeding." United States v. Devlin, 13 F.3d 1361, 1364 (9th Cir. 1994).

"Where a mistrial has occurred, courts have generally regarded a transcript of the prior trial as a tool 'reasonably necessary' to an effective defense and have deemed it error to refuse to provide the defendant with such a transcript, provided that a timely request is made for its production." United States v. Rosales-Lopez, 617 F.2d 1349, 1355 (9th Cir. 1980). In order to be most effective to the defendant, the transcript should be made available before the trial so that defense counsel can prepare the defendant's defense strategy. Devlin, 13 F.3d at 1364.

In this case, the defendant made a request for production of the transcripts to the Court Reporter approximately one hour after this Court declared a mistrial. Review in advance of the retrial of transcripts of the testimony of Officer Guzman and the arguments of government counsel are necessary to adequately and effectively prepare for the impeachment of Officer Guzman and the strategy of the defense, including the procuring of appropriate expert witnesses on the subject of Officer Guzman's immigration-related testimony. The jury for the retrial in this case has not yet been empaneled. Further, it is defense counsel's understanding based on a conversation with government counsel this evening that the government would not oppose a continuance of the retrial. Accordingly, this Court should grant a continuance of a retrial for at least one week in order to provide defense counsel with an opportunity to receive, review, and prepare defense strategy based on the transcripts.

Further, as defense counsel advised the Court today, defense counsel anticipates an inability to procure the presence of Mr. Alday, the 84-year-old witness in poor health residing in Phoenix, Arizona, and to procure expert witnesses to rebut the immigration-related arguments made by government counsel during yesterday's trial by Tuesday, June 17, 2008. The considerable prejudice articulated by this Court during today's proceedings that the defendant would suffer if Mr. Alday was not available at trial to provide live witness testimony, and the defendant's newly-discovered need to procure an additional expert witness further support the need for a continuance of the retrial.

III.

CONCLUSION

For the foregoing reasons, Mr. Smith-Baltiher requests that the retrial in this case be continued at least one week until defense counsel has had an opportunity to receive, review, and prepare based on the trial transcripts, and procure the availability of necessary witnesses.

Respectfully submitted,

Dated: June 11, 2008

/s/ Joseph M. McMullen

JOSEPH M. McMULLEN
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Smith
Joseph_McMullen@fd.org

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing is true and accurate to the best information and belief, and that a copy of the foregoing document has been caused to be delivered this day upon:

Courtesy Copy to Chambers

Copy to Assistant U.S. Attorney via ECF NEF

Copy to Defendant

Dated: June 11, 2008

/s/ Joseph M. McMullen

JOSEPH M. McMULLEN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5030
(619) 234-8467 (tel)
(619) 687-2666 (fax)
joseph_mcmullen@fd.org (email)